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UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/707
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 707

Case No. 732: BELAS-GIANOU

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas at the request of Saida Belas-Gianou, a former staff member of the United Nations Fund for Population Activities, hereinafter referred to as UNFPA, the President of the Tribunal, with the agreement of the Respondent, extended to 31 May 1993 the time-limit for the filing of an application to the Tribunal;

Whereas, on 28 May 1993, the Applicant filed an application containing pleas which read in part as follows:

> "The Administrative Tribunal is respectfully requested to find:
>
> (a) That UNFPA in its appraisal of the Applicant and its decision not to renew her contract violated Article 101, paragraph 3, of the United Nations Charter which provides that 'the paramount consideration in the employment of the staff ... shall be the necessity of securing the highest standards of efficiency, competence and integrity.' The appraisal of the Applicant's performance and the non-renewal of her contract by UNFPA were based on illegal considerations extraneous to the interests of the Organization since they were totally unrelated to the professional and moral criteria of efficiency, competence and integrity of the Applicant, but came as the result of the Applicant's allegations of sexual harassment by her supervisor which UNFPA did not tolerate and failed to investigate in any meaningful way. ...

(b) That UNFPA violated the due process requirements under the principles of the United Nations Charter and the Staff Regulations and Rules in handling the Applicant's allegations of sexual harassment by her supervisor. Moreover, UNFPA failed to investigate the link between such allegations and the negative appraisal of the Applicant's performance. While formally going through certain motions that may give the semblance of justice, UNFPA Administration did not even follow the recommendations of the UNDP/UNFPA Ombudsman Panel which had proposed elements of objective and fair consideration of the Applicant's professionalism. The secretive and inherently flawed procedures of UNFPA's Management Review Group (MRG), which did not even invite the testimony of the Applicant herself, were a further flagrant violation of the due process requirements. This systematic denial of just and equitable treatment of the Applicant and the deliberate attempt to mar her professional image in order to separate her from the Organization demonstrate UNFPA's intention to penalize the Applicant for having exercised her right to seek redress for the situation of sexual harassment to which she was subjected.

(c) That the Applicant was indeed sexually harassed by her supervisor as a result of which she suffered tremendous psychological stress and damage to her health and career.

(d) That the Joint Appeals Board in its Report No. 976 was remiss in not examining the due process problems raised by the Applicant and the very substance of her allegations. The Joint Appeals Board also refused to convoke any of the seven witnesses proposed by the Applicant so as to clarify crucial points regarding her performance and the allegations of sexual harassment. The Joint Appeals Board only convoked the Applicant and four witnesses on the side of the Respondent as well as one other member of the Rebuttal Panel. The Joint Appeals Board did not even convoke the Applicant's supervisor.

Thus the Joint Appeals Board based its report on inadequate and incomplete information, a fact which it itself acknowledged. As a result, until now the Applicant has not received any fair consideration of her allegations of sexual harassment.

The Applicant therefore respectfully requests the Administrative Tribunal to order the Respondent:

(a) To reinstate the Applicant within the Organization and to pay the Applicant the amount of salary lost since her contract was terminated, namely since 5 September 1992.

(b) To provide compensation to the Applicant for the humiliation, intimidation and other psychological damage, and the moral distress to which she was subjected due to sexual harassment and UNFPA's subsequent arbitrary treatment of the situation in the amount of U.S. $120,000."

Whereas the Respondent filed his answer on 14 July 1994;

Whereas the Applicant filed written observations on 31 October 1994;

Whereas, on 12 October 1994, the Tribunal put questions to the Respondent and the Applicant and on 18 October the Respondent requested the Tribunal to adjourn the case;

Whereas, on 20 October 1994, the Applicant submitted observations on the Respondent's request;

Whereas, on 16 November 1994, the Tribunal decided to adjourn consideration of the case;

Whereas, on 5 December 1994, the President of the Tribunal put further questions to the Respondent;

Whereas, on 15 February 1995, the Respondent submitted answers to the questions put by the Tribunal, together with additional documents;

Whereas, on 24 February and 13 March 1995, the Respondent submitted additional documents;

Whereas, on 6 March 1995, the Applicant submitted answers to the questions put by the Tribunal;

Whereas, on 30 May and 5 June 1995, the Applicant submitted observations on the Respondent's answers to the questions put by the Tribunal, and on 27 June 1995, she submitted an additional document;

Whereas, on 19 June 1995, the Applicant submitted a request for an oral hearing;

Whereas, on 28 June 1995, the Tribunal put further questions to the Respondent;

Whereas, on 30 June 1995, the Respondent submitted an additional document, and on 10, 19 and 20 July 1995, he provided answers to the questions put by the Tribunal;

Whereas, on 10 and 11 July 1995, the Applicant submitted observations on an additional document submitted by the Respondent;

Whereas, on 21 July 1995, the Respondent submitted observations on the comments submitted by the Applicant;

Whereas, on 22 July 1995, the Applicant submitted observations on answers submitted by the Respondent to questions put by the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, a national of Algeria and Canada, entered the service of UNFPA on 6 January 1990, as a Programme Officer in the Interregional and NGO Programmes Branch of the Technical and Evaluation Division (TED) at the P-3 level on a two year fixed-term appointment. On 11 January 1991, at her request, the Applicant was reassigned to the Division for Arab States and Europe (DASE). Her appointment was extended for six months, from 6 January 1992 through 5 July 1992, and for two months, through 5 September 1992, when the Applicant separated from the Organization.

According to the Applicant, beginning in the summer of 1991, her immediate supervisor, the Deputy Chief of DASE, ceased treating her in the professional manner which he had previously shown to her and engaged in conduct which she characterizes as "sexual harassment". Such conduct, according to the Applicant, included visits to her office unrelated to her work, unsolicited discussion with her of his personal life, "frequent sexual innuendos," and the use of personal terms of endearment. The Applicant states that on 8 October 1991, the Deputy Chief of DASE gave her a briefcase to take to his relatives in Jordan, where she was travelling on mission. He showed her a pink nightgown in the briefcase, which he described as being for his sister-in-law, and he showed her that there were letters and photographs in the briefcase. On her arrival in Jordan, several books in the briefcase on the Israeli Intelligence Service were confiscated by customs officials at the airport, as material prohibited at the time in Jordan. The Applicant states that she reported this incident to the Team Leader upon her arrival.

The Applicant maintains that in November 1991 she approached and discussed her concerns with senior UNFPA officials including the Deputy Executive Director for Programmes and Administration, the Director of the Latin American and Caribbean Division, and the Chief of the Resource Development Unit, and that at the suggestion of several of these officials, she then spoke to two members of the Ombudsman Panel. The Applicant maintains that she also raised her concerns with the Director of TED, the Director of the Programme Coordination Management and Field Support Office, and the Deputy Executive Director for Programmes. In February 1992 she spoke to the Executive Director of UNFPA.

The Applicant's performance during her first year of service with UNFPA, in the Interregional and NGO Programmes Branch, in 1990, had not been evaluated prior to her transfer to DASE. On 20 November 1991, the Applicant signed the section corresponding to Staff Member of her Performance Review and Staff Development Report (PRR) for 1990.

On 19 December 1991, the Chief of Personnel, UNFPA, informed the Chief, UNDP Staff Development and Placement Section that the Applicant's contract would be extended for six months, from 6 January 1992 through 5 July 1992.

On 31 December 1991, the Chief of the Interregional and NGO Programmes Branch, TED, signed the section of the Applicant's PRR for 1990 corresponding to Immediate Supervisor, rating the Applicant's overall performance between a 3 ("A competent and well-qualified staff member whose performance meets expected standards") and 4 ("A staff member whose performance does not meet expected standards in all respects).

The Applicant's second reporting officer, the Chief of TED, noted in the PRR "a serious deterioration of her working relationships with her supervisor", which "goes beyond personalities contrary to what it may appear on the surface." He attributed the problem to "an insufficient understanding of her individual mission and of the institutional context resulting in a lack of focus" which was aggravated by "defective levels of communication."

The Applicant noted in response to the above assessment, "[s]ince I respectfully disagree with [his] comments on my performance, I cannot sign this document." On 8 February 1992, she submitted a Performance Evaluation Rebuttal, which concluded as follows:

> "I regret that my Chief never provided me with any instructional guidance or constructive feedback on my work, throughout the entire year. Moreover, considering that I received this PER on January 10, 1992, [she] does not seem to have realized that such an overall rating (3/4) necessarily required some form of advance notice and discussion with me, at some point during the course of 1990. That is, if she indeed meant to help me improve my performance. I worked hard and am convinced that I successfully met the expected standards of my job description. Therefore, I beg to disagree with my Chief's overall rating, which I believe I do not deserve."

The Applicant's performance for 1991 was evaluated contemporaneously through a newly instituted Performance Appraisal Review (PAR). On 23 January 1992, the Deputy Chief of DASE signed the section of the PAR corresponding to Immediate Supervisor. The Deputy Chief of DASE rated the Applicant a 4 ("meets some of the expectations of the performance plan but performance needs improvement"), on a scale of 1 ("outstanding"), to 5 ("unsatisfactory"), and commented as follows:

> "... [The Applicant] is not ready to be assigned as Country Director. She needs to improve her skills particularly in financial procedures. The Division recommended the extension of the [Applicant's] contract for six months ending early July 1992. The progress to be achieved by the [Applicant] during this period will be carefully observed and will influence the Division's recommendation for further extension. ..."

On 31 January 1992, the Applicant signed the section of the 1991 PAR corresponding to Staff Member, attaching her comments on the report which challenged her supervisor's appraisal and noted that his rating "does not correspond to the positive comments in this report." She also stated:

"...

I would have appreciated it if, at any time during the year, my supervisors had informed me of any shortcomings in my performance. If anything, during the mid-term performance review of end July 1991, my Division Chief congratulated me on my 'dedication to my work, my excellent conceptualizing capacities,' as well as my 'care for details' in monitoring my programmes. ...

...

As this is not the appropriate forum for me to convey my interpretation of the motivation behind my Deputy Chief's assessment of my work and personality, I reserve my right to do so before the appropriate panel in the house. ..."

This PAR was reviewed by the Management Review Group (MRG) and signed by its chairperson, the Executive Director of UNFPA, on 13 March 1992. Concurring with the 4 rating, the MRG commented:

"The Group noted the assessment of the [Applicant's] performance in 1991. It expressed serious concern at the overall level of performance in the year. There was a consensus that the [Applicant] did not meet expectations in terms of the quality and timeliness of her outputs and therefore the recommended (4) rating was endorsed. The Group noted that the [Applicant] had been given a six month extension of her contract to see if she could bring her performance to a fully satisfactory level. She should be monitored closely by the Division Chief with regular reviews and coaching. Arrangements should be made for her to be trained in programme policies and procedures as well as financial monitoring procedures. An assessment will be made towards the end of her present contract to see if she should be retained on the staff of the UNFPA."

On 18 March 1992, the Applicant was informed that the MRG had also decided to re-assign her to report directly to the Chief of DASE . On 27 April 1992, the Applicant re-submitted, more formally, a rebuttal of her PRR for 1990 and submitted a rebuttal of her PAR for 1991, which stated, inter alia:

> "With all due respect to the objectivity and professionalism of the members of the Management Review Committee, I strongly feel that they have less than fully considered the arguments which I provided in my defence, particularly since the motivation behind [the Deputy Chief, DASE's] assessment of my work and my personality is a personal, not a professional one. This has been constantly borne out in his attitude towards me since the summer of 1991."

On 27 April 1992, the Chief of DASE met with the Applicant to review the progress of her work. He subsequently organized a briefing session for the Applicant on the financial procedures of UNFPA. On 3 June 1992, the Chief of DASE again met with the Applicant to review the progress of her work and noted in his record of the meeting:

> "1. The [Applicant] felt that she was doing well with the daily routine work. I indicated to her that although there was some improvement in this aspect of her work, her output could be better in terms of timeliness. ..."

On 22 June 1992, the Chief of DASE sent a confidential memorandum to the Deputy Executive Director of Programmes evaluating the performance of the Applicant and concluding:

> "My overall assessment of [the Applicant's] performance is that she has not performed at a level expected of a programme officer covering a number of countries adequately."

In the spring of 1992, the Applicant filed a complaint with the UNDP/UNFPA Ombudsman Panel, and on 5 June 1992, the Applicant received a memorandum from the Chair of this Panel informing her as follows:

> "1. As requested by you, I have undertaken to seek an informal solution to your case. I have examined your personnel file, and I have talked to a number of UNFPA staff members. I confirm that no formal appraisal of your performance was provided to you during the period from January 1990 until January 1992, and that you have therefore not been given the opportunity to attend to those aspects of performance which may require further training or support.

2. Along with ... the Coordinator of the Ombudsman Panel, I have discussed your case with ... [the] Chief of Administration, Finance and Personnel of UNFPA. We proposed that UNFPA extend your contract for a one year period, move you to a different division and provide you with clear performance targets which would be regularly monitored. UNFPA are not prepared to do this, since they prefer to await the outcome of the PAR rebuttal process. Therefore we have been unsuccessful in trying to find a solution by means of informal mediation, and the Ombudsman procedure has been exhausted.

3. I therefore suggest that you proceed to take your case to the Joint Appeals Board."

On 18 June 1992, the Applicant was informed that her contract would be renewed from 6 July 1992 for one month, "to allow the performance rebuttal process to run its course." On 24 July 1992, the Applicant was advised that, for the same reason, her contract would be extended for an additional month.

The Rebuttal Panel's conclusions, delivered on 24 July 1992, were not unanimous. The entire opinion is reproduced below.

"INTRODUCTION

1. The Panel, which was set up by UNFPA to review the rebuttal of [the Applicant's] performance appraisals, met from 15th-16th June, and on a number of days between the 9th and 24th of July 1992. In addition to [the Applicant] the Panel interviewed 12 (twelve) staff members (list attached) who have been associated with her in an official capacity and are aware of her job performance. These included her immediate and second level supervisors in both 1990 and 1991. The Panel reviewed the documentation provided by the Administration and by the [Applicant]; this material was available to all parties concerned.

2. The task of the Panel was to review the performance appraisals given by [the Applicant's] immediate supervisors for the periods 1990 and 1991 respectively, and to ascertain whether these assessments correctly reflected the level of job performance. In carrying out this task, the Panel carefully and impartially reviewed the issues raised in the [Applicant's] rebuttal.

3. The Panel did not achieve unanimity in its findings and conclusion. Therefore, this report is divided into two separate sections: the findings and recommendation of the two concurring panel members and the findings and recommendation of the dissenting member.

FINDINGS AND RECOMMENDATION OF THE CONCURRING PANEL MEMBERS

4. Following a review of the documentation, extensive interviews with staff members, and lengthy discussions among the panel members, the concurring panel members concluded that the rating between the 3rd and 4th boxes in 1990, and the '4' rating in 1991 given by her immediate supervisors were justified and accurately reflected the calibre of [the Applicant's] work.

5. In coming to this conclusion, the concurring members are mindful of the positive opinions of [the Applicant's] performance expressed by the respective leaders of the Yemen and Jordan PRSD Exercises. Indeed, the [Applicant's] immediate supervisor for 1991 also indicated that there were some instances when her work was in line with the expectations of the performance plan. However, the vast majority of persons interviewed, indicated that the [Applicant] manifested a number of shortcomings which seriously limited the effectiveness of her work and, consequently, the work of the units involved. Her supervisors observed that [the Applicant] failed to comprehend adequately the various dimensions of her work. They noted also that she had a problem with time management and was frequently unable to meet deadlines or produce work in a timely manner. Moreover, some of those interviewed observed that she had difficulty in handling a number of tasks simultaneously.

6. The concurring members of the Panel note that the [Applicant] was given indications of the deficiencies in her performance on several occasions. During 1990, the Chief of the INT/NGO Branch told the [Applicant] of areas where her performance needed improvement. In August 1991, the Chief of the DASE, during the six-month PAR Review, told her that there were shortcomings in her work, particularly with regard to the timely processing of project matters. In October 1991, the Deputy Executive Director, Programme, had an interview with [the Applicant], during which he pointed out areas of her work that needed improvement.

7. The concurring members believe that the PRR and the PAR exercises were carried out in an objective fashion. We do, however, wish to indicate that the performance review process

would have been facilitated had the supervisors' discussions with the [Applicant] the matter of unsatisfactory performance been put in writing.

8. Considering all of these factors, the concurring members of the Panel conclude that the PRR rating for 1990 and the PAR rating for 1991, given by her immediate supervisors and upheld by the Management Review Group, are justified, and we therefore recommend that the ratings stand as given.

[Signed]	[Signed]
Nicholas Dodd	Catherine S. Pierce
24/7/1992	24 July 1992
(Date)	(Date)

FINDINGS AND RECOMMENDATION OF THE DISSENTING PANEL MEMBER

9. In accordance with UNDP/ADM/91/17/Add.2 of 15 May 1992 PAR interim rebuttal procedures ('A member of the panel who disagrees with the findings and recommendations of the majority may include relevant comments in the report'), my relevant comments are therefore included hereunder.

10. I disagree with 'the [4] rating with six months extension of contract ending early July' of the immediate supervisor and the final endorsement of the [4] rating of the PAR Management Review Group for 1991.

11. I would rate her performance during the two years as [3]: satisfactory performance by the staff member. This was achieved under difficult circumstances, including constant intimidation and verbal abuse by the immediate supervisor of the first year, with denial of training in an area for which she was then criticized in (1991) PAR, and belittling and gender/cultural discrimination by the immediate supervisor in the second year.

12. Regarding the first year, without training in programme officer work of the kinds to which [the Applicant] was assigned, supervisors cannot expect the staff member immediately to perform all tasks perfectly, and it is their responsibility to provide proper support. (Reference, United Nations ICSC Standards of Conduct in the International Civil Service 1954, p. 6, paragraphs 12, 13, and 14).

(a) She not only received minimum support throughout that year but was prohibited from taking financial training, by an immediate supervisor well known in the

Fund for this kind of conduct and for the number of staff urgently requesting to be transferred out of her jurisdiction.

(b) [The Applicant] nevertheless managed to complete the tasks successfully i.e. her team work contribution to the NGO Consultation in Europe in May 1990, and to the preparation of the Governing Council paper on the Interregional Programme, as verified by her two colleagues in the Branch, Mr. Wasim Zaman [Deputy of the Interregional and NGO Programmes Branch], and Ms. Sahir Abdul-Hadi [a staff member of the Interregional and NGO Programmes Branch].

13. Regarding charges on performance in the second year. She completed almost all Outputs and Deadlines in her Performance Plan, despite an unusually heavy simultaneous workload. As far as I know, no other Programme Officer in her Division carried the tasks of two PRSD Missions and a Country Programme in one year:

(a) Lack of understanding in financial procedure. The UNFPA Financial Branch testified that this had not done any serious damage to UNFPA financial arrangements, and that any small mistakes that she made, other people in DASE also made during 1991.

(b) Her performance in almost simultaneously organizing the briefings and debriefings of the Yemen and the Jordan PRSD missions (and participation in the later as a team member for ten days) was done well and appreciated by the two team leaders: Mr. Mohammed Nizammuddin, and Mr. Wasim Zaman. When asked by the panel, the two of them rated her performance during this period -- over two thirds of the year -- as satisfactory [3], and Mr. Nizammuddin would even give her a [2] rating for averting situations that could have embarrassed UNFPA.

(c) Since Jordan does not have a UNFPA Country Director, the major workload and responsibility of writing the Country Programme for approval by the Governing Council also fell upon her. Her immediate supervisor criticized her performance of this task but the Team Leader of Jordan PRSD Mission, who was frequently involved, testified that [the Applicant] completed the task satisfactorily.

14. Paragraph 24 of UNFPA Performance Appraisal Review: Instructions and Guidelines (PAR), states, under the heading 'Separation'. that 'A well documented case of continued incompetence or incapacity on the job in spite of remedial developmental activities is essential for determining a staff

member's suitability for continued service with UNFPA'. The placing of [the Applicant] on a six-month probationary extension therefore requires the following comments:

(a) This is in no way a 'well-documented case':

i. For 1990, under a supervisor whose mistreatment of [the Applicant] was testified to by her two Branch colleagues, Mr. Zaman and Ms. Abdul-Hadi, no incompetence can be validated.

ii. Her PRR for 1990 was signed by that supervisor only on December 31, 1991, a whole year later. The second supervisor only signed her PRR for 1990 in 1992, one year and four months later - and one month after the decision by the Management Review Group was signed by the Executive Director.

iii. For 1991 there is no record from anyone of anything that could be called 'continued incompetence or incapacity on the job'.

(b) There were no 'remedial development activities', and any formal training in Administration and Finance, on which her performance is held against her but which Financial Branch will not endorse, was denied her.

15. The recommendation in the PAR by the immediate supervisor, of only a six month extension with clear threat of termination on the basis of a [4] rating is a further departure from the explicit terms of the UNFPA PAR Guidelines:

(a) Paragraph 37 of the Guideline, dealing specifically with remedial development for staff receiving a Rating [4], states that 'a more elaborate Performance Plan may be established for the coming review year'. The clear intent is that a staff member with a [4] will have at least a full year for such remedial development.

(b) This is made even more clear further in para. 37 where there is explicit reference to a staff member 'rated a second time in this category'. And even after a second [4] in the second PAR, separation is cited as only a third step that may be taken, below two alternative options, 'further significant investment in -- training', and 'transfer to a different post/function'.

The MRG confirmation of [the Applicant's] placement on short probationary contract under direct threat of

termination is wholly out of order with the terms of UNFPA's own official PAR Guidelines.

16. I am compelled to note the further unusual treatment of [the Applicant] in the imposition on her of all 'remedial development' within even less than six probationary months, and in further adverse conditions:

(a) Supervisors did not even commence this remedial development at the beginning of the extension. For example, it was only on 5 May 1992 - in the fourth of the six months - that she had a 'briefing' in project accounts and financial procedures by Ms. Juliana Barrow of Finance Branch, Division of Finance, Personnel and Administration.

(b) Her request that the probationary period be carried out in another division was denied. She remains next door to, and shares a secretary with the same immediate supervisor whom she reported since November 1991, to no less than seven senior management officials of UNFPA, plus three members of UNDP/UNFPA Ombudsman Panel for harassment (sexual remarks and disrespectful treatment as a single Arab woman). On my own observation and other knowledge of this supervisor's behaviour towards young independent-minded Arab women professionals, and the seriousness with which [the Applicant] has tried to secure attention to this conduct, it cannot be dismissed.

(c) She has also had to undergo two rebuttal processes (PRR 1990 and PAR 1991) during this short probationary period.

17. As a long-serving staff member of UNFPA, and serving UNDP/UNFPA staff for two consecutive terms in Ombudsman panel, I have to say that on the record of this case, the treatment of [the Applicant] is unfair and unconscionable.

18. The misuse of PAR Guidelines should be corrected by proper extension of [the Applicant's] contract. She is a dedicated, hard-working staff member who has not been given fair opportunity to demonstrate her worth to the Fund. She should be re-assigned, afforded such remedial development as may be genuinely needed, and given earliest opportunity to serve in the field.

[Signed]
Mallica Vajrathon

24 July 1992
(Date)

LIST OF PERSONS INTERVIEWED

1. Ms. Sahir ABDUL-HADI
2. Mr. A.M. ABU-NUWAR
3. Ms. Elvie AJERO
4. Ms. Juliana BARROW
5. Ms. Saida BELAS-GIANOU
6. Dr. Jose DONAYRE
7. Ms. Mehri HEKMATI
8. Mr. M. NIZAMUDDIN
9. Mr. Eric PALSTRA (by phone)
10. Ms. Linda SHERRY-CLOONAN
11. Mr. Ugur TUNCER
12. Mr. J. VAN ARENDONK
13. Mr. Wasim ZAMAN"

At a meeting on 4 August 1992, the MRG reviewed the report of the Rebuttal Panel and concluded that the assessments of both supervisors were "based solely and objectively on professional performance", and that the PRR and PAR ratings should be maintained. They noted that "[n]o substantiation whatsoever was found for the claim by the [Applicant] that the supervisor's 4 rating of the PAR 1991 had been based on personal motivation."

On 5 August 1992, the decision of the MRG was communicated verbally to the Applicant, and she was informed that her contract would not be renewed. In a letter to the Applicant, dated 7 August 1992, the Chief, Division for Finance, Personnel and Administration, confirmed that the Applicant's appointment "which will expire on 5 September 1992, c.o.b. [close of business], will not be extended."

On 5 August 1992, the Applicant requested administrative review of the decision not to renew her contract. On 14 August 1992, the Chief of the Legal Section, UNDP Division of Personnel, informed the Applicant, in response to her request, that "we consider that you have been accorded all the elements of due process, and therefore the administrative decision taken in your case is being maintained."

On 28 August 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB), with a request for suspension of action. The JAB Panel constituted to consider the appeal held a summary

hearing on 1 September 1992 to consider the request for suspension of action. On 2 September 1992, the JAB adopted its report on the request, which concluded and recommended as follows:

> "20. The Panel concluded that there was a serious possibility that proper procedures were not observed vis a vis the Appellant: the first indication that her performance during the previous two years was anything less than satisfactory was conveyed to her in January 1992, and only after she raised the allegation of harassment by her supervisor; the recommendations of the Ombudsman Panel were not followed; the strong dissenting opinion of the Management Review Board was paid no heed. In view of these facts, the Panel concludes that the process of expediting the termination of the Appellant's employment with the Organization appears to be precipitous.
>
> 21. Therefore, the Panel recommends that all action to separate the staff member from service be suspended pending the decision on the substance of this appeal, and that in the interim, she be assigned to another post in UNDP commensurate with her background."

On 4 September 1992, the Assistant Secretary-General for Human Resources Management transmitted a copy of the JAB report to the Applicant and notified her of the Secretary-General's decision not to accept the JAB's recommendation for the suspension of action. On 5 September 1992, the Applicant was separated from the Organization.

On 11 January 1993, the JAB adopted its report on the merits of the Applicant's appeal. The report is reproduced in full as follows:

> "1 The Panel of the Joint Appeals Board (JAB), composed of
>
> Ms. Hisako Shimura, Chairperson,
>
> Ms. Judith-Ann Charles,
> Member appointed by the Secretary-General, and
>
> Ms. Irene Morosov,
> Member elected by the Staff,

having considered the appeal of Ms. Saida Belas-Gianou (hereinafter the Appellant) against the decision not to renew her appointment beyond its expiry date, hereby submits its report to the Secretary-General.

Summary of Facts

2. The Appellant, a national of Algeria and Canada, was recruited at the P-3 level in January 1990 as a Programme Officer at the United Nations Fund for Population Activities (UNFPA) on a two-year contract. Her appointment was renewed for six months commencing January 1992, and was subsequently extended for two additional months. She was separated from service on 5 September 1992.

3. From January 1990 to January 1991, the Appellant worked in the Interregional and NGO Programmes Branch (INT/NGO) of the Technical and Evaluation Division (TED) where her supervisor was Ms. Mehri Hekmati, Chief of the Interregional and NGO Programmes Branch, TED.

4. At the Appellant's request, she was reassigned to the Division of Arab States and Europe (DASE) in January 1991, and shortly thereafter, her supervisor became Mr. Abdul-Muniem Abu-Nuwar, Deputy Chief of DASE.

5. The Appellant states that until the summer of 1991 she 'enjoyed a good rapport with everyone in the Division' and that 'this abruptly ended when Mr. Abu-Nuwar ceased treating me in the professional manner which he had previously shown me', characterizing some of his behaviour as 'sexual harassment'.

6. On 20 November 1991, the Appellant signed her Performance Review and Staff Development Report (PRR) covering the time when she was supervised by Ms. Hekmati (it is not clear from the documentation when the Appellant was given the PRR.)

7. On 31 December 1991, Ms. Hekmati signed the supervisor's section of the PRR. In a range that varies from excellent to unsatisfactory, the Appellant's job performance was rated between 'good and somewhat below standard' for job knowledge and competence; 'somewhat below standard' for effectiveness and 'good' for sense of responsibility.

8. The Appellant was also evaluated in the same PRR by a second reporting officer, Mr. José Donayre, the Chief of TED, as follows:

'In the course of [the Appellant's] assignment to the INT/NGO Branch of TED, I have witnessed a serious deterioration of her working relationships with her supervisor. This is a complex situation which goes beyond personalities contrary to what it may appear on the surface. There is the more fundamental issue of how to deal with problems of performance on the part of the staff member. An insufficient understanding of her individual mission and of the institutional context resulting in a lack of focus in the staff member's work seem to be at the root of the problem. Defective levels of communication with peers and supervisor tend to aggravate the situation. I therefore, agree with the ratings of the supervisor.'

9. The Appellant noted in response to the above assessment, 'since I respectfully disagree with Dr. Donayre's comments on my performance, I cannot sign this document.'

10. On 31 January 1992, the Appellant signed her completed Performance Appraisal Review (PAR) for the year 1991 that her supervisor, Mr. Abu-Nuwar, had signed on 23 January 1992. (A new performance evaluation system was instituted at UNFPA effective January 1991; the 'PRR' was replaced by the 'PAR'). Of a range from 1 (outstanding), to 5 (unsatisfactory), he rated the Appellant 4 (meets some of the expectations of the performance plan but performance needs improvement). This PAR was then reviewed by the Management Review Group and signed by its chairperson Dr. Nafis Sadik, on 13 March 1992. Concurring with the 4 rating, the MRG also added:

'The Group noted the assessment of the staff member's performance in 1991. It expressed serious concern at the overall level of performance in the year. There was a consensus that the staff member did not meet expectations in terms of the quality and timeliness of her outputs and therefore the recommended (4) rating was endorsed. The Group noted that the staff member had been given a six-month extension of her contract to see if she could bring her performance to a fully satisfactory level. She should be monitored closely by the Division Chief with regular reviews and coaching. Arrangement should be made for her to be trained in performance policies and procedures as well as financial monitoring procedures. An assessment will be made towards the end of her present contract to see if she should be retained on the staff of the UNFPA.'

11. The Appellant inquired about the procedure for rebuttal and via memoranda from the Chief of Personnel on 30 March 1992 was told how to do so.

12. On 5 June 1992 the Appellant received a memorandum from the UNDP/UNFPA Ombudsman Panel informing her of their recommendations in response to her complaint (the JAB file does not indicate when the Ombudsman Panel was contacted). The Ombudsman Panel noted that they had recommended to the Administration that it extend the Appellant's contract for a year, move her to another division and provide her with clear performance targets which would be regularly monitored, but they were informed that UNFPA Administration preferred to await the outcome of the rebuttal process. The Ombudsman Panel suggested that the Appellant take her case to the Joint Appeals Board.

13. UNFPA Administration informed the Appellant, on 18 June 1992, that her contract would be extended until August 1992 'To allow the rebuttal process to run its course.'

14. In a memorandum dated 22 June 1992 from the Chief of DASE to the Deputy Executive Director, the subject of which was 'Performance Evaluation of [the Appellant]', the DASE Chief set forth his appraisal of the Appellant's performance (she had reported to him since March 1992). The substance of this evaluation was that although the Appellant tried to do her best and had good intentions for carrying out her responsibilities, her output had been less than satisfactory in terms of timeliness and quality (examples to illustrate such were included). At the conclusion of his evaluation, the DASE Chief stated:

> 'my overall assessment of [the Appellant's] performance is that she has not performed at a level expected of a programme officer covering a number of countries adequately.'

15. The Rebuttal Panel which was set up by UNFPA to review the Appellant's performance appraisals (the PRR and PAR) met on 15th and 16th of June 1992 and for several days between 9th and 24th of July 1992.

16. The Rebuttal Panel consisted of Dr. Nicholas Dodd, Chairperson, Acting Chief, MCH/FP Branch, TED (nominated by DFPA), Ms. Catherine S. Pierce, Chief, Women, Population and Development Branch, TED (nominated by the Management Review Group), and Ms. Mallica Vajrathon, Senior Technical Officer, ECJ Branch, TED (nominated by the Appellant).

17. The Rebuttal Panel members defined their task as reviewing the performance appraisals given by the Appellant's immediate supervisors for the years 1990 and 1991 to ascertain whether those assessments correctly reflected her level of job performance. They interviewed thirteen staff members, including the Appellant.

18. The Rebuttal Panel's conclusions were not unanimous; and a dissenting opinion was filed by the member nominated by the Appellant.

19. In their 24 July 1992 report, the majority report noted that although they were mindful of the positive opinions that had been expressed about the Appellant's performance, the vast majority of persons they interviewed indicated that the Appellant manifested a number of shortcomings which seriously limited the effectiveness of her work: that she failed to comprehend adequately the various directions of her work, that she had a problem with time management (frequently unable to meet deadlines or produce work in a timely manner), and that she had difficulty in handling a number of tasks simultaneously.

20. The Rebuttal Panel majority report concluded that the PRR rating for 1990 and the PAR rating for 1991 should stand.

21. The majority noted that the Appellant's performance review process would have been facilitated had her supervisors' discussions with the staff member about unsatisfactory performance been put in writing.

22. The dissenting Rebuttal Panel member put forth her views that the Appellant deserved a 'satisfactory' rating for each of her two years of service with the Organization; that the Appellant had been subjected to constant intimidation and verbal abuse by her first-year supervisor; belittling and gender/cultural discrimination by her second-year supervisor and had been denied the training that would have enhanced her job performance. As to the alleged harassment by Mr. Abu-Nuwar, she stated that 'on my own observation and other knowledge of this supervisor's behaviour towards young independent-minded Arab women professionals, and the seriousness with which [the Appellant] has tried to secure attention to this conduct, it cannot be dismissed.'

23. The Management Review Group to which the Rebuttal Panel sent its recommendations submitted its report on 5 August 1992. They concluded that 'the assessments of both supervisors were found ... to have been based solely and objectively on professional performance', and that the PRR and PAR ratings should be maintained. They further concluded that the Appellant 'had been given adequate supervision and guidance, training opportunities and changes in assignments and supervisors.'

24. On 5 August 1992 the Appellant was informed that her contract which had been extended to 5 September 1992 would not be renewed.

25. On 5 August 1992, the Appellant requested an administrative review of the decision not to renew her contract. On 14 August 1992, in a memorandum from the Chief of the Legal Section, UNDP Division of Personnel, she was told 'we consider that you have been accorded all the elements of due process and therefore the Administrative decision taken in your case is being maintained.' The memorandum confirmed that her appointment would expire on 5 September 1992.

26. On 28 August 1992, the Appellant submitted a request for suspension of action to the JAB.

27. The JAB Panel constituted to consider the request held a summary hearing on 1 September 1992, and on 2 September 1992 recommended that action to separate the Appellant from service be suspended pending the decision on the substance of this appeal.

28. On 4 September 1992, the Secretary-General decided not to accept the JAB's recommendation for the suspension of action.

Contentions

The principal contentions of the parties are summarized as follows:

Appellant

29. In 1990, a few months after she joined the Organization, the Appellant requested a transfer, alleging that her supervisor, Ms. Mehri Hekmati 'was unfair'; that she 'refused requests for guidance' and 'behaved in a rather aggressive manner.' She was transferred to the Division of Arab States and Europe (DASE) at the beginning of 1991.

30. The Appellant contends that during the summer of 1991, her supervisor at DASE, Mr. Abu-Nuwar, began to harass her and no longer treated her 'in the professional manner which he had previously shown me'; that he frequently came to her office for non-work related reasons and discussed aspects of his personal life, calling her 'darling' and 'dear, and making 'frequent sexual innuendos,' which made her feel 'uncomfortable and harassed.'

31. The Appellant alleges that Mr. Abu-Nuwar's treatment of independent-minded, single and professional Arab women was different from that he showed toward other women, including

Arab women married to Arab men; that he told her stories 'meant to impress and frighten me' and made gestures 'which he knew would be very harmful, given my Arab and Muslim background.' The Appellant states that during the summer of 1991, she told several close personal friends in London about the harassment inflicted by Mr. Abu-Nuwar.

32. The Appellant states that although her supervisor did not physically attack her, nor ask for any sexual favours, he 'created an intimidating and hostile working environment' for her. Among the examples cited, although not of a sexual nature, is one which occurred when she was on mission to Jordan in October 1991: her supervisor hid two banned books in a briefcase he asked her to bring to a Jordanian relative, the discovery of which led to her being detained at customs. She reported the incident to her team-leader.

33. The Appellant contends that she grew 'more and more desperate' and, in November 1991, she told the Chief of the Resource Development Unit, who had helped her obtain a transfer away from Ms. Hekmati's supervision, about her complaints. On his advice, the Appellant states that she approached two members of the UNDP/UNFPA Ombudsman Panel. She states that she also spoke with the Deputy Executive Director for Policy and Administration who agreed that she might take her complaint to the Ombudsman Panel. She names some senior staff members to whom she contends that she went for advice on how to handle the harassment: these include the Chief of the Personnel Branch, the Director of the Latin American and Caribbean Division, the Director of the Technical and Evaluation Division and the Director of the Programme Coordination Management and Field Support Office.

34. The Appellant relates that in November 1991, when she learned from the Chief of DASE that UNFPA might not extend her appointment beyond six months, this was the first indication she had that her work was perceived as other than excellent.

35. The Appellant alleges that her supervisor's continuing harassment caused her to take sedatives and led to her inability to sleep and that in January 1992 she consulted Dr. Sergei Oleinikov of the UN Medical Service who advised her to see a psychologist.

36. On 13 March 1992, as part of its PAR assessment of the Appellant's performance, the MRG recommended that she be monitored closely by the Division chief. Shortly thereafter, the Division Chief became her supervisor.

37. The Appellant contends that having this new supervisor could not solve the problem because she was still in immediate contact with Mr. Abu-Nuwar, who also reported to the DASE Chief and with whom she shared a secretary.

38. Although on 22 June 1992, her then supervisor sent a memorandum to the Deputy Executive Director of UNFPA critiquing her performance, she was not given a copy. The Appellant did not receive a copy until 4 August 1992, by which time the Rebuttal panel had submitted its findings.

39. Although her supervisors indicated that she required certain training, the Appellant notes that she was not provided with any training other than a two hour financial procedures session on 5 May 1992, and that this subject did not play a significant part in her job performance.

40. The Appellant further contends that there was a conflict of interest in the recourse procedure that permitted the Management Review Group to be 'both judge and jury of the case'.

41. The Appellant states that there 'are many reasons to believe that the Administration's decision was, at the very least, suspect' notably that at the time he completed his portion of her 1991 PAR, Mr. Abu-Nuwar knew that the Appellant had alleged that he sexually harassed her and that such allegations were common knowledge in UNFPA. She contends that she was 'rail-roaded' out of the Organization as a result.

42. As relief, the Appellant requests:

- Full reinstatement in the United Nations preferably not at UNFPA;
- Reimbursement for loss of earnings;
- Suitable compensation for the mental and emotional stress she has suffered.

Respondent

The Respondent's major contentions are summarized as follows:

43. It is the Respondent's contention that the non-extension of the Appellant's fixed-term appointment was totally consistent with staff rule 104.12(b) which holds that a fixed-term appointment does not carry any expectation of renewal or conversion to any other type of appointment.

Citing staff regulation 4.2 which states 'the paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity for securing the highest standard of efficiency, competence, and integrity,' the Respondent notes that it is incumbent on the Secretary-General to be guided by the quality of the Appellant's performance as reflected in the applicable reports.

44. The Respondent notes that the assessments of both supervisors were found by the Management Review Group to have been based solely and objectively on the Appellant's professional performance, that no substantiation whatsoever was found for the claim that the PAR rating had been based on personal motivation and that this conclusion was reached after reviewing the report of the Rebuttal Panel, including the dissenting opinion.

45. The Respondent notes that although the Appellant had not submitted a formal complaint of harassment, both the Rebuttal Review Panel and the MRG considered all of the Appellant's allegations including the personal motives of her supervisors.

46. The Respondent states that 'The Appellant fully exercised her rights of recourse through the established procedure and was accorded full due process.'

Procedure

48. The Panel met in executive session on 17 November 1992, 1 and 2 December 1992. After due consideration of the Appellant's request to take testimony, the Panel elected to examine the three members of the Rebuttal Panel: Dr. Nicholas Dodd, Ms. Catherine S. Pierce and Ms. Mallica Vajrathon. Additional witnesses were Dr. Nafis Sadik and Dr. José Donayre. Hearings were held in conjunction with the December meetings. The witnesses all appeared at the 1 December meeting. The examination of Ms. Vajrathon continued on 2 December.

49. The Appellant, her Counsel, and the Representative of the Secretary-General, were present during the hearings. The parties had the opportunity to question witnesses, elicit clarification and comment on the testimony.

Considerations

50. The Panel considered the following to comprise the principal elements of this appeal:

(a) Whether the Appellant's performance reviews had been formulated in accordance with applicable and customary procedures;

(b) Were they to find that either or both of these performance reviews were improperly formulated, whether such ultimately led to the non-renewal of the Appellant's contract.

51. The two concurring members of the Rebuttal Panel, although heard separately, shared similar opinions. They sought to determine whether the Appellant's ratings reflected her job performance. After calling thirteen witnesses, including the Appellant, they concluded that there was no evidence that the ratings were not proper. They never considered sexual harassment to have been a factor in this case.

52. The dissenting Rebuttal Panel member related that although she personally had not experienced any difficulty with Mr. Abu-Nuwar, she observed that he had different ways of treating different people 'in accordance with where they were in the bureaucracy.' She told the Panel that during meetings she personally observed him criticizing Arab staff in public. However, she never saw or heard him harass the Appellant.

53. The Panel took note of Dr. Sadik's statement that the Appellant prepared her own work plan and was not over-burdened by additional or unexpected assignments that might have adversely affected her work. Dr. Sadik also stated that had the Appellant claimed sexual harassment by her supervisor, she would have arranged for an investigation of such.

54. The Panel further noted that Dr. Donayre told the Panel his assessment was that the Appellant did not understand the performance level expected of her. He stated that the Appellant complained to him in December 1991 when she expressed dissatisfaction with her performance review and that she made no mention of harassment at the time.

55. The Panel carefully examined the activities associated with each of the Appellant's performance reviews. The Panel was aware that the first review was not done until a year after it was due, but it observed that all too frequently throughout the Organization performance reviews are not done in a timely manner. Thus, they found nothing unusual or covert about the delay.

56. In compliance with staff rule 111.2(k) the Panel did not seek to re-consider the merits of the Appellant's job performance but, rather, to determine whether as alleged by the Appellant, these reviews were tainted by prejudice or other extraneous factors, including sexual harassment.

57. The Panel considered that for 1990 the Appellant's supervisor rated her performance between 'good' and 'somewhat below standard.' It noted that the Appellant indicated she did not get along with this supervisor. Although some witnesses described the supervisor as 'demanding', the Panel found no evidence that this supervisor held the Appellant to more rigorous standards than any of her other subordinates, nor was her review discordant with the written critique of Dr. Donayre, who was the Appellant's second reporting officer. His comments appear in paragraph eight of this report.

58. In considering the Appellant's Performance Review (PAR) for 1991, the Panel noted that the '4' rating: 'meets some of the expectations of the performance plan but performance needs improvement', was consistent with the evaluation she was given in 1990. The Management Review Group's assessment, 'there was a consensus that the staff member did not meet expectation in terms of the quality and timeliness of her outputs...' seemed to affirm these observations.

59. During the hearing it was brought out that, because written interim negative criticisms in a staff member's personnel file may later prove to be more harmful than helpful, the informal policy was for a supervisor, from time to time to discuss, rather than document, aspects of job performance that should be improved. Thus, there was nothing unusual about the Appellant not being given written warnings prior to her formal performance reviews as her supervisors had discussed her work with her. The Panel noted that her supervisor did send a written critique of the Appellant's performance to the Deputy Executive Director of UNFPA on 22 June 1992, a copy of which should have been sent to the Appellant. However, the Panel had doubt that this would have had any effect on the subject case.

60. The Panel, in considering the Appellant's complaint that she was denied training which would have enabled her to better perform her job functions, did not find that this was so. It noted that the Appellant had received training in Management Information Services, field staff orientation and Women in Developing Countries. Although the financial management training she was given in 1992 was brief, this

subject did not constitute a major part in her work; the Panel found it doubtful that earlier or more extensive sessions about finance would have affected the Appellant's job performance.

61. The Panel noted that the supervisors' assessments and the testimony of all of the witnesses, except Ms. Vajrathon, revealed the following observations: the staff member did not understand the performance level expected of her, set discordant priorities for herself, and had time-management problems.

62. The Panel considered that the Appellant availed herself of opportunities for rebutting each of her performance reviews. Accordingly, her performance appraisals were the subject of an Ombudsman Panel evaluation and recommendation as well as a Rebuttal Panel review and decision. Neither group found any undue influence that might have affected the performance reviews.

63. The Panel examined the circumstances associated with the Appellant's allegations of sexual harassment by her supervisor during the time between July and November 1991. Although ST/AI/379 of 29 October 1992, 'Procedures for Dealing with Sexual Harassment', was not in effect at the time the Appellant alleges her supervisor sexually harassed her, the Panel used it as a reference when considering this part of the appeal. ST/AI/379 defines sexual harassment as 'any unwelcome sexual advance, request for sexual favours or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment.'

64. Addressing the Appellant's contention that once she started to mention her problems of harassment, she found herself 'rail-roaded out of the Organization on the basis of inadequate performance for which there is not a shred of evidence,' the Panel, after studying the documentation and testimony, notes that although the time sequence when these events took place was not clear, neither the written materials nor the testimony of the witnesses produced any evidence that led the Panel to conclude that the Appellant's allegations led to the performance reviews she was given.

65. When the Panel recommended that the Secretary General grant the Appellant's request for a suspension of action, one of their major concerns was that the Appellant have the benefit of an examination of her sexual harassment allegations.

66. Recognizing the seriousness of such allegations and aware that acts of harassment do not customarily occur in public or before witnesses, the Panel looked for the circumstantial evidence which might be present as a result of such behavior. The very lack of any mention of harassment by the Ombudsman Panel; the absence of any documentation or action taken by anyone in any manner reinforced the Panel's belief that these allegations were raised later in the process. Although the Panel has little doubt that the Appellant believes she has been singled out for harassment by her 1991 supervisor, objectively it could find no evidence of such.

67. The Appellant cited the following as some of the more glaring examples of her supervisor's alleged harassment:

(a) A briefcase she carried to a Jordan mission, given to her by her supervisor, which contained books that were confiscated by customs officials.

(b) Being addressed as 'darling' or 'dear' by her supervisor.

(c) Visits to her office by her supervisor, when both were working late, during which he told her details about his personal life.

68. The Panel concluded that the example cited in '(a)' may have shown questionable judgment, but would not be harassment.

69. After assessing the Appellant's own description of the circumstances under which example 'b' allegedly occurred, the Panel concluded that these words, were they used, are not so unusual or derogatory that hearing them would reasonably result in extreme emotional distress and ultimate inability to perform one's work. Further, the Appellant herself stated that she never indicated to her supervisor that she found this form of address offensive. (During her testimony the Appellant stated that her supervisor addressed her in Arabic. Thus their colleagues could not understand what he was saying to her.)

70. When the Panel asked the Appellant with regard to 'c', whether she ever told her supervisor that she did not deem it proper for him to relate stories about his personal life, she stated that she never requested that he refrain from such nor did she discourage him or offer any other indication that might indicate to her supervisor that his behaviour was

unwelcome. The Panel concluded that while the Appellant may have attributed other meanings to her supervisor's behaviour, what she described here would not appear to be sexual harassment.

71. It is the Panel's belief that the acts described by the Appellant, in her own words, do not correlate with the descriptions used in ST/AI/379. The Appellant stated in her written appeal that her supervisor did not make sexual advances toward her. She told the Panel that at no time did she ask him to cease his behaviour or otherwise indicate she considered his actions improper. The Panel concludes that the allegations, whether or not true, - were given greater importance by the Appellant than might be considered reasonable.

Conclusions and Recommendation

72. Addressing the Appellant's contention that 'once she started to mention her problems of harassment', she found herself 'rail-roaded out of the Organization', the Panel found no links to substantiate that contention.

73. The Panel concluded that each of the Appellant's supervisors had the right to assess her job performance in accordance with reasonable and proper standards and each had done so. It found no evidence whatsoever that the Appellant's performance ratings had been motivated by extraneous factors. No evidence was put forth to show that undue influence was presented by or to any supervisor or other staff member.

74. The Panel further concluded that there has not been any violation of staff rule 104.12(b) which covers fixed-term appointments, the kind of appointment under which the Appellant was employed, and which states that 'The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment' because the Administration was under no obligation to renew the Appellant's contract for any reason - most particularly after she was given less than favourable performance reviews.

75. In addition, the Panel notes that staff rule 109.7(b) which pertains to the expiration of fixed-term appointments provides that separation from service as a result of the expiration of a fixed-term appointment shall not be regarded as a termination. Therefore, they concluded that the Appellant was not terminated and is not entitled to re-appointment, to any compensation as a result of the non-renewal of her contract or to damages.

76. The Panel wishes to note that the Appellant has been afforded full due process and has failed to substantiate any of her allegations to the satisfaction of any of the forums invoked for that purpose including this Panel of the JAB.

Report and recommendations unanimously adopted by the Panel of the Joint Appeals Board.

Hisako Shimura, Chairperson

Judith-Ann Charles,
Member appointed by the Secretary-General

Irene Morosov,
Member elected by the Staff

Audrey King, Secretary to the Staff

11 January 1993"

On 25 January 1993, the Secretary-General informed the Applicant as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report. He fully agrees with the Panel's unanimous conclusions that you were afforded full due process and that you are not entitled to re-appointment. He has decided, therefore, to take no further action on your case."

On 28 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The appraisal of the Applicant's performance and the non-renewal of her contract by UNFPA were based on illegal considerations extraneous to the interests of the Organization, and

came as a result of the Applicant's allegations of sexual harassment by her supervisor.

2. The Applicant's right to due process was violated by the failure of UNFPA to investigate her allegations of sexual harassment in a meaningful way and by its failure to investigate the link between such allegations and the negative appraisal of the Applicant's performance.

3. The deliberate attempt to mar the Applicant's professional image in order to separate her from the Organization demonstrates UNFPA's intention to penalize her for having exercised her right to seek redress for the situation of sexual harassment to which she was subjected.

4. The Applicant was sexually harassed by her supervisor as a result of which she suffered tremendous psychological stress and damage to her health and career.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to, or legal expectancy of, further employment with UNFPA upon the expiration of her fixed-term appointment.

2. The Applicant's performance reports and the decision not to renew her appointment were not vitiated by improper motives or any other extraneous factors.

3. The Applicant's due process rights have been fully respected. The Applicant's performance reports were the subject of a full rebuttal process during which time the Applicant's appointment was extended.

The Tribunal, having deliberated on 11 October in New York, and from 14 to 28 July 1995 in Geneva, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent dated 25 January 1993. That decision adopted a unanimous Joint Appeals Board (JAB) recommendation that no further action be taken with respect to the Applicant's challenge to the action by the Administration in allowing her fixed-term appointment to expire. The Applicant's claim is that her fixed-term appointment was not renewed in retaliation against her for complaints that she had been sexually harassed by her supervisor. The Applicant also asserts that the Organization failed to investigate her allegations in any meaningful way, and violated her rights to due process. Accordingly, she asks that the Tribunal declare the decision against renewal of her contract null and void, that she be reinstated with back pay, and that she be compensated for damages and moral distress in the amount of $120,000.

II. The Tribunal has carefully considered the Applicant's request for an oral hearing, which, if granted, would be the third evidentiary hearing held in this case. The Applicant seeks to adduce testimony from four staff members. The Tribunal put written questions to them and received responses which did not support allegations made by the Applicant. The Applicant also seeks to call as a witness one other person who was among the 13 persons who submitted testimony to the Rebuttal Panel and whose testimony (which related to the Applicant's female supervisor during 1990) appears to be summarized in a Note dated 21 July 1992, by the dissenting member of the Rebuttal Panel. The latter also reported in the Note a "belittling of the work done by another single arab woman ... a couple of years back" by the Applicant's supervisor during 1991, in contrast to his quite proper treatment of all other women.

In view of the postponement of this case at its last session, the substantial amount of documentation in the file, the hearing with numerous witnesses before the Rebuttal Panel, the JAB hearing followed by its thorough report (which the Tribunal has decided should be reproduced above in full, along with the Rebuttal Panel report), and responses received to questions put by the Tribunal,

which are discussed below, the Tribunal has concluded that yet a third hearing with potentially numerous witnesses is not necessary to decide this case. The file is adequate for a decision without further delay. The Tribunal also notes in this regard that, in contrast to its central function which is basically appellate in nature, the body with primary responsibility for fact-finding after consideration of the evidence is the JAB.

III. As the Tribunal indicated in Judgement No. 560, Claxton (1992), allegations of sexual harassment and related retaliation are viewed by it with the utmost seriousness. In Claxton, the Tribunal also indicated the essentiality of an investigation to determine what had occurred and whether it constituted sexual harassment, noting that this might be a difficult task. It is, of course the responsibility of the person alleging sexual harassment or related retaliation to produce convincing evidence in support of the allegations. In order to assist the Tribunal in its deliberations, it directed questions to the parties and numerous individuals who might have been knowledgeable with regard to the Applicant's allegations. The responses from the Applicant and 20 such persons, as well as a related communication from the dissenting member of the Rebuttal Panel, have been carefully considered and, as will be seen, the Tribunal concludes from all the evidence that the Applicant has not sustained her burden of proof.

IV. In the present case, the issues before the Tribunal are whether (1) sexual harassment occurred; (2) the non-extension of the Applicant's contract was based on inadequacies in her performance or was in retaliation for her sexual harassment complaints; and (3) the Applicant's rights to due process were violated. The Tribunal accepts, as the JAB did, the definition of sexual harassment contained in ST/AI/379 dated 29 October 1992, even though the Applicant's allegations of sexual harassment related to a period between July and November 1991, prior to the issuance of ST/AI/379. The Tribunal considers appropriate the ST/AI/379 definition of

sexual harassment as "any unwelcome sexual advance, request for sexual favours or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment."

V. It will be seen from this definition that a finding of sexual harassment must be predicated on one or more of three elements: either an unwelcome sexual advance, an unwelcome request for sexual favors, or other unwelcome verbal or physical conduct of a sexual nature. The Applicant's claim is based entirely on her belief that her supervisor, during the period in question, engaged in other unwelcome verbal or physical conduct of a sexual nature and that this created an intimidating, hostile or offensive work environment.

VI. In support of her allegation, the Applicant asserts the following, none of which she expressed to her supervisor as being unwelcome at the time they occurred or thereafter:

(a) During the summer of 1991, her supervisor entered her office without knocking. He enthusiastically expressed pleasure at the thought that others in the Department would be on vacation for a week and that he and the Applicant would be working alone in the office.

(b) Thereafter, the supervisor often came to the Applicant's office, remaining there for unduly long periods in which he complained about his wife, said that he was unhappily married, that his situation was unbearable, and that he was depressed.

(c) During these visits to the Applicant's office, he addressed her as "darling" or "dearest," or the Arabic word which means "dear" but is allegedly also the word used to refer to a lover.

(d) The supervisor made frequent sexual innuendoes in Arabic, but the Applicant does not describe exactly what these consisted of.

(e) The Applicant was allegedly embarrassed by her supervisor's way of looking at her, but no further explanation was offered in the application as to what this consisted of or why it occasioned embarrassment. In response to a request by the Tribunal for more detailed information with respect to this and item (d) above, the Applicant states that her supervisor looked at her repeatedly "up and down with a smile and half-closed eyes." To her it seemed "as if he was undressing her." The alleged innuendoes are characterized as such only in conclusory terms.

(f) The Applicant tried to leave her office by consulting her watch conspicuously and saying that she had to go. She was afraid to tell her supervisor to leave and her indirect efforts to get him to leave were unsuccessful.

(g) In connection with a business trip by the Applicant to Amman, Jordan, the supervisor asked her to deliver a small briefcase to his sister-in-law who lived there. He showed her some of the contents of the briefcase, consisting of a nightgown, some personal letters and family photographs. When she arrived in Jordan, customs officials discovered two books in the briefcase of which she had previously been unaware. The books related to the Israeli intelligence service. They were confiscated and the Applicant was criticized by Jordanian customs officials.

(h) The Applicant's supervisor was generally hostile to independent-minded, single, professional Arab women as against all others. He manifested this hostility by rude criticisms of them in the presence of others and by generally discourteous conduct.

(i) The Applicant was allegedly frightened by a story her supervisor told her. In it he claimed to have murdered someone because of an insult to his honor, saying that was the way of Bedouins.

(j) Her supervisor blew cigarette smoke in her face during a Muslim holiday period when she was fasting and engaged in other undescribed incidents similarly hurtful to an Arab Muslim but which otherwise might seem insignificant.

VII. The Applicant's supervisor has denied any improper conduct of a sexual nature or otherwise. His explanation of various events referred to by the Applicant is significantly different from that asserted by her. In particular, his explanation of the episode involving the two books relating to the Israeli intelligence service and their availability in Jordanian book stores casts doubt on the validity of the Applicant's allegations with respect to that matter. The supervisor also asserts that at the time he apologized for any inconvenience that might have been caused. In addition, the supervisor's submission to the Tribunal specifically denies the allegations enumerated in paragraph VI above. With respect to the Applicant's claim of being fearful of and intimidated by her supervisor, he submits that this is inconsistent with the fact that she was not at all hesitant or timid about openly expressing disagreement with him on job-related matters and questioning his views with respect to them. Moreover, he states that during the period of her employment, a friendly social relationship existed between the Applicant and his family.

VIII. The Applicant says that, because she was fearful of possible consequences, she did not object to her supervisor about the above conduct and did not bring it to the attention of any officials of UNFPA until November 1991, about four months after it allegedly began. She asserts that some of these officials expressed to her that what she was saying amounted to sexual harassment. The officials involved, as well as a number of colleagues, do not agree that any claim of sexual harassment was brought to their attention by or discussed by them with the Applicant though some recalled discussions with h relating to professional performance issues or issues concerning her working relationship with her supervisor. In one instance the official involved could not recall when the discussion occurred but understood it as a confidential conversation and not as a complaint to be followed up.

IX. Although the Tribunal is sensitive to claims of sexual harassment and has made clear the responsibility of the Organization to address them promptly and effectively, this, of course, requires that the Organization first be aware of them. Moreover, in the absence of some indication that the person whose conduct is drawn in question was either on notice or should reasonably have realized from the circumstances that the conduct was unwelcome, might be viewed as being of a sexual nature and as creating an offensive working environment, the Tribunal would have difficulty in finding that the individual involved had engaged in sexual harassment. This is especially true where conduct is described in vague terms or is ambiguous, may not have been motivated by improper intentions, and might well have ceased altogether upon request. For these and other reasons, it is essential that the Tribunal carefully examine claims of alleged sexual harassment to ensure that they are soundly based and that persons accused are not condemned without just cause. A belief in good faith that one has been the victim of sexual harassment, however strongly held, does not automatically mean, without more, that sexual harassment occurred. If it did, no need would exist for ST/AI/379 or any similar instruction. Sexual harassment would become self-defined by anyone claiming in good faith to be a victim.

X. In this case, wholly apart from the question whether the Applicant's supervisor knew or should have known that his conduct was unwelcome within the meaning of ST/AI/379, there is insufficient evidence of "verbal or physical conduct of a sexual nature" (emphasis added) to have created an intimidating or hostile work environment. The enumerated items are at most either ambiguous, or the possibility of a relationship between them and conduct of a sexual nature is both tenuous and remote. This is not the sort of conduct that appears to the Tribunal to constitute sexual harassment

contemplated by ST/AI/379. Even items (d) and (e), as explained by the Applicant in response to the Tribunal's questions, are still vague, highly subjective and also susceptible of different meanings. They are marginal in nature. But, if they had promptly been brought to the attention of the supervisor or the Administration as being unacceptable behavior and the supervisor had nevertheless persisted with similar conduct, a different conclusion might be justified.

XI. Some conduct of the Applicant's supervisor described by the Applicant and reported by others, or by her to colleagues as professionally belittling or insulting, while not tantamount to sexual harassment, doubtless reflected poor judgement and was rude or inappropriate. Such incidents would surely warrant counseling and disciplinary measures, if repeated. For no official is entitled to be disrespectful, rude or to engage in inappropriate conduct. At the same time, however, the Tribunal reiterates that it is important for a staff member who is aggrieved by any such behaviour to make a clear and unequivocal complaint promptly, if unable to have it stopped immediately by less formal measures. The Tribunal recognizes that some burden is thus imposed on the aggrieved party but, unless problems of this nature are brought to light quickly and dealt with at an early stage, they are likely to become worse and more difficult to deal with later.

XII. The Tribunal is not alone in its assessment of whether there was sexual harassment in this case. The JAB report, following its hearing on the issue of sexual harassment, reached the same conclusion. (See JAB report, paragraphs 63 to 71).

XIII. One of the Applicant's contentions is that the JAB chose not to hear testimony from all of the witnesses sought to be presented by the Applicant. This contention is lacking in merit. The JAB may, in the reasonable exercise of its discretion, decide on the

witnesses it wishes to hear. It did so in this case. The Tribunal notes that the potential witnesses named in the application as persons having knowledge of the Applicant's situation were persons whose knowledge was based essentially, if not exclusively, on what the Applicant told them of her experiences. It was not unreasonable for the JAB to decline to call such witnesses when it was fully apprised of the Applicant's claims by the Applicant herself. Moreover, the JAB heard the testimony of the member of the Rebuttal Panel who had been nominated by the Applicant and who dissented from the report of the Panel regarding the Applicant's performance evaluations. The latter was familiar with the Applicant's contentions, having previously been consulted by the Applicant regarding them, apparently in November or December 1991, before being nominated by her to the Rebuttal Panel.

XIV. The opinion of the Rebuttal Panel's dissenting member appears to have treated the question of sexual harassment, however briefly, as having been complained about before the Rebuttal Panel in connection with the performance evaluation. The majority members of the Rebuttal Panel assert, on the contrary, and the Applicant's written submission to the Rebuttal Panel confirms, that the Applicant made no such claim in it. Moreover, both the Chairman of the Rebuttal Panel and the other majority member, in response to further questions, stated that although the Applicant "stated that her supervisor had made 'remarks of a sexual nature' for example, referring to her as 'dear' and 'darling'" in conversations with her and also discussed his personal problems with her, she said that she was not making any complaint of sexual harassment and had not made such a claim to the Ombudsman. The Tribunal notes an odd inconsistency between the Applicant's allegations of having been assertive months earlier in having told others about her mistreatment which she believed was sexual in nature and which, according to her, they characterized as sexual harassment, and the

absence of such an allegation in her written submission to the Rebuttal Panel, as well as her reluctance, reported in a statement dated 28 April 1995, by the dissenting member of the Rebuttal Panel, even to characterize as sexual harassment what she was describing until the end of the hearing.

XV. Among the other witnesses heard by the JAB was the other female member of the Rebuttal Panel and the female Administrator and Executive Director of UNFPA. The Tribunal finds that, whether or not the Applicant formally complained about it, both the Rebuttal Panel and the JAB had before them the question whether sexual harassment was related to the non-renewal of the Applicant's appointment.

XVI. With respect to whether the non-renewal of the Applicant's fixed-term appointment was in retaliation for her allegation of sexual harassment, the Tribunal notes that, contrary to the Applicant's contentions, the expiration of a fixed-term appointment and its non-renewal are not tantamount to termination and, therefore, do not involve the same procedural or substantive requirements as a termination. The Tribunal has repeatedly held that it will not interfere with a decision by the Respondent to permit a fixed-term appointment to expire in the absence of proof that the decision was tainted by prejudice or other extraneous factors or that the staff member had a legal expectancy of a further appointment. Accordingly, when the evidence shows that there was no legal expectancy and that considerations of performance rather than extraneous factors led to a non-renewal decision, the Tribunal has found no occasion for remedial action. In this case, there is no showing of any legal expectancy of a further appointment. The question then is whether it was the Applicant's allegations or her performance that motivated the non-renewal decision.

XVII. In order to accept the Applicant's contention that retaliation for her allegations about sexual harassment, rather than her performance, was the factor governing the decision not to renew her appointment, the Tribunal would have to conclude:

(1) That the performance evaluation with respect to the Applicant's first year by her female supervisor, which was concurred in by the Applicant's second reporting officer (as to whom no claim of impropriety has been made), was part of a deliberate conspiracy or of a coincidental desire by several individuals to railroad her out of the Organization;

(2) That the performance evaluations with respect to her second year and the subsequent eight months of extensions by her supervisor, and by her second reporting officer (as to whom no claim of impropriety was made and who became her supervisor for the last eight months of her appointment) was similarly motivated;

(3) That the Management Review Group which considered and affirmed the foregoing performance evaluations and whose members were both male and female was similarly motivated, or wrongly evaluated the Applicant's performance with knowledge of, but without taking into account, her sexual harassment or retaliation claims;

(4) That the Rebuttal Panel majority consisting of a male and female made the same error; and

(5) That the Management Review Group compounded the error by subsequently accepting the conclusions reached by the Rebuttal Panel majority.

XVIII. With respect to the first three points, the Applicant argues that the fact that her performance evaluation for the first year of her appointment was not issued until the end of her second year, coupled with the fact that she did not get along with her female supervisor and had sought a transfer after a few months, is evidence from which the Tribunal should infer that the performance evaluation with respect to the first year was biased and part of the alleged conspiracy. However, the JAB report "observed that all too frequently throughout the Organization performance reviews were not

done in a timely manner." The panel found nothing unusual or covert about the fact that the first performance evaluation was not completed until the end of her second year. The Tribunal accepts the view of the JAB panel on this point, particularly in view of the explanation provided by the Director, Division for Finance, Personnel and Administration, in a memorandum dated 14 February 1995, in which she pointed out that the timing of the evaluations was related to the change in the evaluation system and also to circulars issued by the Administration requesting that the evaluations be submitted. The Tribunal notes that, in a subsequent communication to it by the Director dated 29 June 1995, she strongly disputed allegations by Counsel for the Applicant that prior statements by the Director to the Tribunal, in which she denied that the Applicant had asserted claims of sexual harassment were false. After considering the Applicant's comments regarding the 29 June 1995 communication, the Tribunal credits the Director's version of what occurred. In addition, the Tribunal is unwilling to ascribe to the Applicant's first year female supervisor (or her second reporting officer who testified before the JAB) the evil intention that the Applicant would impute to them merely because of the Applicant's differences with her female supervisor. The Tribunal notes that the Rebuttal Panel found and the Tribunal has confirmed that the Applicant was given indications of her performance deficiencies during both the first and second years of her appointment.

XIX. After having reviewed the responses to the numerous questions put by the Tribunal to the Applicant and the 20 persons referred to above, as well as the related communication from the Rebuttal Panel dissenting member, the Tribunal finds no evidence, beyond the Applicant's say-so, to support her contention that any of the Applicant's supervisors or second reporting officers during her first or second year were part of a conspiracy or of a coincidental desire by each to retaliate against her for complaining about sexual harassment. From a review of the responses, the various

evaluations, the statement of the Management Review Group and the report of the Rebuttal Panel majority, which were, in part, favourable to the Applicant, the Tribunal is satisfied that the Applicant's performance was objectively evaluated on the basis of proper standards, and that retaliation played no part in the evaluation. Indeed, among the allegations of the Applicant which were inquired into by the Tribunal was a claim that the female Executive Director of the UNFPA had threatened two male members of the Organization, who the Applicant described as having functioned as her supervisors, and who she also asserted were "familiar with [her] mistreatment", with adverse consequences in connection with their statements regarding the Applicant before the Rebuttal Panel. Both of these individuals, in response to questions put by the Tribunal, denied having observed or having any direct knowledge of sexual harassment or mistreatment of the Applicant. They also denied having been threatened in any way, and denied having functioned as the Applicant's supervisors. One of the two reported to the Tribunal that he recalled that the Applicant had informally spoken to him "about her being professionally mistreated, often ridiculed and belittled, and subjected to a hostile work environment ..., particularly with regard to her work on the Jordan PRSD exercise." Both of the males described themselves as colleagues who had worked on assignments with the Applicant on different occasions for varying periods. Their judgements regarding her performance, which, of course, the Administration was not obliged to agree with, were generally favourable although one noted that the Applicant needed guidance in order to accomplish her tasks.

In essence, the Applicant's claims of sexual harassment and related retaliation find support only in her own statements to the Tribunal and to others to whom she says she conveyed them. But the responses to questions put by the Tribunal to the various individuals either flatly dispute the Applicant's allegations or simply fail to bear them out by anything other than what the Applicant herself said. That she may have felt aggrieved about the

way in which her work performance was perceived or about the way in which she perceived her work environment, while regrettable, is an insufficient basis for challenging the non-renewal of her appointment.

XX. The Tribunal concurs in the JAB panel's finding of no links between the Applicant's complaints about harassment and the non-renewal of her appointment. On this, the JAB said:

> "73. The Panel concluded that each of the Appellant's supervisors had the right to assess her job performance in accordance with reasonable and proper standards and each had done so. It found no evidence whatsoever that the Appellant's performance ratings had been motivated by extraneous factors. No evidence was put forth to show that undue influence was presented by or to any supervisor or other staff member.
>
> 74. The Panel further concluded that there has not been any violation of staff rule 104.12(b) which covers fixed-term appointments, the kind of appointment under which the Appellant was employed, and which states that 'The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment' because the Administration was under no obligation to renew the Appellant's contract for any reason - most particularly after she was given less than favourable performance reviews."

XXI. The Tribunal has reviewed the report of the Rebuttal Panel majority and the dissent. The Tribunal finds no reason to conclude that the Rebuttal Panel majority did not fairly and objectively review the performance evaluations. In doing so, it is clear from a response to questions put by the Tribunal that it took into account the Applicant's description of her supervisor's use of the terms "dear" and "darling" and his discussion of personal problems with her, which influenced the views of the dissenting member. That the majority disagreed with those views is not a reason for the Tribunal to conclude either that the majority was motivated by evil intentions or otherwise erred in its conclusions. The dissent simply evaluated the Applicant's performance differently and was convinced that the issue of sexual harassment should have been given

more attention. In addition, the dissent concluded that the two performance evaluations plus the Applicant's evaluation during the extended period did not constitute a well-documented case of incapacity. These, however, are judgemental matters and it was within the reasonable discretion of the Administration to decide whether the performance problems described in the various evaluations warranted renewal of the Applicant's contract.

XXII. In summary, the Tribunal reaches the same conclusion as the JAB panel, namely, that the evidence does not show that the non-renewal of the Applicant's contract was motivated by retaliation for her complaint about sexual harassment. It goes without saying, of course, that a complaint of this nature made in good faith, may not be considered justification for adverse action against a staff member, even if the complaint proves to be unfounded.

XXIII. The Applicant also asserts that non-renewal of her contract was unlawful because the applicable guidelines with respect to performance evaluations were not adhered to. The Tribunal notes that the performance evaluation system with respect to the second year of the Applicant's appointment was not the same as the first year. The Applicant's second year performance received a 4 rating. Her first year performance, rated under a different system, was between a 3 and 4, and the reasons were explained in a statement, quite critical of her, by her second reporting officer. The portion of the guidelines applicable to the 4 rating received by the Applicant with respect to the second year provides:

> "For staff rated in this Category a more elaborate Performance Plan <u>may</u> be established for the coming review year with more frequent Interim Reviews, ... If performance continues to be lacking and the staff member is rated a second time in this Category, the following steps <u>may</u> be taken:
>
> (a) Further significant investment in training on-the-job and/or formal training;

(b) Transfer to a different post/function (usually at a lower level of responsibility);

(c) Separation from UNFPA service." (Emphasis added.)

XXIV. The Applicant argues that, since she did not receive a second 4 rating, her separation was unjustified. The Tribunal does not agree. These Guidelines do not impose mandatory requirements on the Organization. They are merely descriptive of what may be done, but this does not prevent different discretionary action taken reasonably. Here the Applicant had a negative evaluation between a 3 and 4 under the system formerly in effect and a lower 4 rating under the new system. In that circumstance, given the system change, it was not unreasonable for the Respondent to decide against a renewal of her appointment for yet another year, particularly when during the additional eight months of the Applicant's tenure, her performance problems reportedly persisted.

XXV. The Applicant asserts that she was denied due process in connection with her performance evaluations and in the proceedings before the JAB. The Tribunal has already found that there was no denial of due process in the JAB proceeding with regard to the witnesses it decided to hear. Nor was there any other violation of the Applicant's rights to due process before the JAB. The JAB panel fairly considered all of the evidence and all of the Applicant's contentions. The same is true of the performance evaluation process. At each stage the Applicant had and availed herself of the opportunity to present her position, and it was considered fairly. As noted above, the Rebuttal Panel report shows that it considered the testimony of 13 witnesses, including those by whom, the Applicant says, her performance was regarded favourably, and whom the Applicant felt should have been interviewed by the Management Review Group.

XXVI. The Applicant has asserted to the Tribunal that she was defamed as a result of an alleged press release issued by UNFPA

which rejected suggestions that staff members had engaged in sexual harassment and stated that allegations by one staff member had been investigated with a determination that they were without foundation. In addition, the alleged press release stated that

> "For reasons of poor performance, ... fixed term contracts of two staff members were not renewed ... Contrary to recent press reports, the staff members were not 'fired.' Both staff members had a history of poor performance ratings by different supervisors."

The Tribunal notes that the Statement of Position was prepared only because newspapers had previously contained accounts alleging sexual harassment by an official of UNFPA against two women.

Although the Applicant's contention relating to the alleged press release was not considered by the JAB and thus is not properly before the Tribunal, the Tribunal, nevertheless, made inquiries of the Administration with regard to it against the possibility that evidence germane to the issues in this case might be revealed. It appears that the document referred to by the Applicant was not a press release and was not published by UNFPA. Instead, it was a statement of UNFPA's position in response to newspaper stories which had appeared on 28 September 1992 and 20 October 1992 and related media phone calls. The document was intended to be used as a reference guide for UNFPA spokespersons and was apparently used in that manner. At a general press briefing, reporters asked questions with regard to the matter and also requested and received copies of the statement, but it was not distributed to the press in general. The investigation referred to above did not relate to the Applicant. The references to "poor performance" in the Statement of Position were a reflection of UNFPA's characterization of the underlying reason for non-renewal of the Applicant's contract and, in the circumstances, do not appear to the Tribunal to be pertinent to the issues in the case or to warrant any further comment by the Tribunal.

XXVII. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 28 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/708
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 708

Case No. 776: OUDEH

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 5 January 1994, Hassan Ahmed Oudeh, a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application requesting the Tribunal, inter alia, to order:

"1. [The production of certain documents]

2. [That the Respondent reinstate] the Applicant to service, and [consider] him on special leave with full pay ever since he applied for reinstatement for the first time after his separation, i.e. 1988.

3. [That the Respondent compensate] the Applicant for the loss and injury he sustained estimated at US$45,000.

4. [That the Respondent pay] secretarial and the legal counsel's fees estimated at US$2,000."

Whereas the Respondent filed his answer on 4 May 1994;

Whereas the Applicant filed written observations on 1 August 1994;

Whereas, on 29 November 1994 and 12 June 1995 the Respondent submitted additional statements;

Whereas, on 18 July 1995, at the Tribunal's request, the Respondent provided additional comments;

Whereas, on 24 June, 11 and 25 July 1995, the Applicant submitted additional statements and documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 12 October 1963 as a Preparatory Teacher, at grade 6, step 01, on a temporary indefinite appointment. He served thereafter until 31 May 1986, on which date he resigned from the Organization having reached grade 10, step 16, as a Senior Arabic Teacher. The Applicant was then paid his separation benefits.

On 20 April 1992, the Applicant wrote to the Director of UNRWA Affairs, Syria, requesting "either to have me reinstated to my teaching post or otherwise have me paid my terminal emoluments in addition to the monthly salaries of the period from 1988 to 1992 during which I was unemployed due to the losses sustained by me." In his letter, the Applicant stated that he had submitted an application for reinstatement in his post on 5 August 1988 and should have been re-appointed to a teaching position with the Agency "on the basis of the Agency rules providing that priority in appointment should be given to the resigning staff members rather than new candidates. However, UNRWA's Department of Education disapproved of my reappointment under the pretext that during my period of resignation I did not work in my field of specialization as a teacher."

In a reply dated 20 June 1992, the Field Director advised him as follows:

> "A) Your prior knowledge of the instructions concerning the so-called 'priority' of ex-teachers for re-employment which was abrogated in October 1985 should have urged you to inquire about the validity of that instruction

before you resigned in 1986; particularly so, because you had pinned your hopes for re-employment with the Agency on that instruction;

B) That instruction was only mentioned in Personnel Directive A/4, which means it was intended only for consideration of Administration staff upon deciding on recruitment of new teacher candidates, and in no way was it considered an exclusive right for re-employment as the policy of the Agency has always been before the introduction and after the cancellation of that instruction to recruit the best qualified candidates;

C) Had that instruction not been abrogated before you resigned there would have been no guarantee to prevent its abrogation thereafter as the Agency can and does change its rules and policies whenever the Agency deems appropriate, which you must undoubtedly have realized through your long service with this Agency."

After an exchange of correspondence with the Respondent, on 16 November 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 28 October 1993. Its recommendation reads as follows:

"IV. Recommendation

14. In view of the foregoing [i.e. that priority over new candidates was to be given to those who applied for re-employment within 3 years of the date of their resignation and that because he was not a staff member, the Applicant could not submit an appeal to the Joint Appeals Board] and without prejudice to any further oral or written submissions to any party the Applicant may deem pertinent, the Board unanimously makes its recommendation to declare the application not receivable."

On 4 November 1993, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"I enclose a copy of the report of the Joint Appeals Board on your appeal, which was forwarded to me under cover of a memorandum dated 28 October 1983 from the Chairman. As

you can see, the Board has concluded that it has no jurisdiction to entertain the appeal, which was held to be not receivable. I accept this conclusion..."

On 5 January 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent abrogated unilaterally the policy of granting priority to staff previously employed without safeguarding their acquired rights.

2. The decision is flawed by mistake of facts since the change in policy may not have been made clear to all staff involved.

3. The Respondent breached his contractual commitments to the staff as expressed in his Memorandum of Understanding in connection with the priority of reinstatement of teachers.

Whereas the Respondent's principal contentions are:

1. The Applicant has not alleged a non-observance of his employment contract.

2. On the merits of the Applicant's application, there is no evidence that the Respondent's decision was in any way improper and there is no evidence that the Applicant applied for reinstatement in 1988.

The Tribunal, having deliberated from 7 to 28 July 1995, now pronounces the following judgement:

I. The Tribunal has considered in previous cases the issues raised in this case regarding the abrogation of priority consideration for re-employment of teachers. (Cf. Judgements No. 650, Bakr (1994) and No. 684, Abdul Rahim (1994)).

II. Unlike those cases, however, in this case, the Applicant provides no documentary evidence to support his assertion that he applied for re-employment with the Agency in 1988, within three years following his resignation. The first record of this assertion is to be found in a letter dated 20 April 1992, almost four years later, from the Applicant to the Director of UNRWA Affairs, Syria.

III. It is this letter of 20 April 1992, and the reference contained therein to the Applicant's application for re-employment, "submitted on 5 August 1988," which is put forward by the Applicant as evidence. He argues that this was not contested by the Respondent. Although the reply to this letter, dated 20 June 1992, cites the abrogation of priority consideration as a reason for rejecting the Applicant's request for relief, the Respondent now, in the pleadings before the Tribunal, explicitly contests the assertion that the Applicant applied for re-employment in 1988.

IV. The Tribunal considers that the failure of the letter of 20 June 1992 to challenge the Applicant's assertion that he had applied for re-employment cannot in itself be considered an admission that the Applicant's assertion is true. Rather it could be that, in rejecting the Applicant's request for relief, the Respondent did not have to reach the factual issue of whether the Applicant applied for re-employment because his request was rejected on broader grounds.

V. The Tribunal has examined the Applicant's personnel file and finds no evidence of his having applied for re-employment in 1988. Furthermore, the Applicant has not produced a copy of any letter sent by him or of any rejection received from the Department of Education. In these circumstances, the Tribunal considers that the Applicant has not met the burden of proof required to establish his claim.

VI. For the foregoing reasons, the application is rejected in its entirety as are the requests for the production of documents and for costs.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 28 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/709
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 709

Case No. 771: NABHAN

Against: The Commissioner General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 10 August 1993, Nimer Ahmad Mahmud Nabhan, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 8 December 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"[To call certain persons as witnesses and to]

Reinstate me with the Agency in light of the circumstances which prevailed and the recommendation of the Joint Appeals Board."

Whereas the Respondent filed his answer on 17 May 1994;

Whereas the Applicant filed written observations on 20 January 1995;

Whereas, on 24 May 1995, the Applicant submitted an additional statement;

Whereas, on 20 June 1995, the Applicant submitted additional documents and on 4 July 1995, the Respondent provided his comments thereon;

Whereas, on 18 July 1995, the Tribunal put questions to the Respondent to which he provided answers on the same day;

Whereas, on 18 July 1995, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 May 1970, as Assistant Distribution Team Leader, Grade 2. With effect from 1 February 1974, he was appointed Distribution Team Leader, Grade 6, and was subsequently transferred to the post of Area Sanitation Officer, Grade 6. With effect from 1 January 1981, the Applicant was appointed to the post of Camp Services Officer, Kalandia Camp, Grade 7. The Applicant's services were terminated for misconduct, with effect from 1 January 1992.

In a memorandum dated 4 June 1991, the Area Officer, Jerusalem, informed the Director of UNRWA Operations, West Bank, that "some uncomfortable pieces of information" regarding the Applicant had come to his office. He added that "talk continues on his exploitation of his job for his personal benefit," mentioning the fraudulent use of a ration card and abuses related to his supervision of the camp sewage system. He suggested that the Applicant be transferred, to avoid "possible friction with [the] camp community."

According to the record, on 27 July 1991, a group of masked youths entered the Applicant's office, destroyed some furniture, and demanded his resignation. In a leaflet dated 15 August 1991, the Applicant was accused of eighteen counts of misconduct, and UNRWA was "given two weeks as of the date of this leaflet to deal with the subject of the CSO [Camp Services Officer]."

On 17 August 1991, the Director of UNRWA Operations, West Bank, appointed a Board of Inquiry, composed of the Field Supply and Transport Officer, the Legal Officer (General Assistance), the Associate Administration Officer and the Administrative Assistant, Legal, to investigate the allegations made against the Applicant. In a memorandum dated 20 August 1991, the Director of UNRWA Operations, West Bank, informed the Applicant that allegations of misconduct had been made against him and that he was suspended from duty with pay, with effect from 22 August 1991, pending the outcome of the investigation.

In another leaflet dated 21 August 1991, the attack on the Kalandia Camp Services Office was condemned. An apology was issued to UNRWA officials in the camp, with a "pledge to the camp residents that we will fight this vile group who is trying to disunite our ranks."

A letter to the "General Director of UNRWA", dated 12 September 1991, from "Inhabitants and residents of Qualandia Camp", stated that the charges against the Applicant were "several worthless untrue charges and false accusations," and defended him as "an example of faithfulness, loyalty, dignity and honour." The letter suggested that following an unsuccessful attempt by the Director of UNRWA Offices, Ramallah, to transfer the Applicant from the Kalandia camp, the Director "tried afterwards to invent justifications against [the Applicant]" and hired "several depraved and corrupted young men and who were paid in order to deform the reputation of [the Applicant]".

The Board of Inquiry interviewed nineteen witnesses, examined relevant documents, and undertook physical inspections of sites in the camp. Its report, adopted in November 1991, found that four of the accusations against the Applicant were well-founded: (i) he had exploited sanitation labourers subordinate to him to work at his private home while they were on duty, (ii) he had been involved in the fraudulent use of a ration card registered in the name of a deceased refugee, (iii) he had counterfeited, for personal gain, the

number of trips made by vacuum tankers to clean sewage tanks, (iv) he had registered families outside the camp allowing them to benefit from rations to which they were not entitled.

The Board noted that "there was much rancor and animosity among the principal antagonists and that perhaps the inquiry was being used as a forum to settle a personal vendetta." It considered the Applicant s defence that there was a "conspiracy to defame him". Although the Board noted "it is certain that the [Applicant's] allegations contain an element of truth", it concluded that the weight of the evidence supported a finding that the Applicant "committed the mentioned improprieties while in the course of his work."

In a letter dated 6 January 1992, the Director of UNRWA Operations, West Bank, notified the Applicant that the Administration had decided, based on the Board of Inquiry's findings, to terminate his services for misconduct, pursuant to Area Staff Regulation 10.2, with effect from 1 January 1992. On 11 January 1992, the Applicant requested administrative review of this decision, maintaining that he was a victim of prejudice. In a letter dated 15 January 1992, the Director of UNRWA Affairs, West Bank, confirmed the contested decision. On 21 January 1992, the Applicant lodged an appeal with the Area Staff Joint Appeals Board (JAB).

On 10 May 1993 the JAB transmitted its report to the Administration. Its conclusion and recommendation read as follows:

"...

1. The investigation and the consequent decision of the Agency were motivated by extraneous factors, i.e. an accusing leaflet prepared and published by outsiders.

2. The testimonies made by various witnesses to the Inquiry Board, were, in the words of the Inquiry Board, tainted by such rancor and animosity among the antagonists and the system was misused to settle a personal vendetta. The testimonies led, ultimately, to the Agency's decision to terminate the services of the Appellant.

V. RECOMMENDATION

In view of the foregoing the Board by majority of its votes (dissenting opinion of ..., Board member attached), makes its recommendation that the Administration's decision of 6 January 1992 to terminate the Appellant's service for misconduct under staff rule 110.1 be reviewed with a view to make the termination in the interest of the Agency under staff rule 109.1."

In a separate letter, dated 19 April 1993, the dissenting member of the JAB advised the Chairman of his belief "that the accusations launched against [the Applicant] were motivated by extraneous factors and were not established..." He therefore recommended reinstatement of the Applicant, noting "I have no objection to serving him with a letter of censure in addition to any suspension from work for a limited period of time but not to terminate his services under any staff rule."

In a letter dated 8 June 1993, the Officer-in-Charge, Headquarters, transmitted a copy of the JAB report to the Applicant and informed him as follows:

"... As you can see, a majority of the Board's members has recommended that the decision to terminate your services for misconduct under area staff rule 110.1 (i.e regulation 10.2), be changed to termination in the interest of the Agency under area staff rule 109.1 (i.e. regulation 9.1). I believe that the Agency's decision was based on adequate evidence that the Appellant had defrauded the Agency and abused his position for personal benefit. Nonetheless, in the interest of finality, I accept this recommendation and accordingly confirm that the termination of your services with effect from 1 January 1992 will stand, but that you will now be eligible to receive a termination indemnity under area staff rule 109.9. The Field Administration in Jerusalem will communicate with you in this respect.

I have noted the Board's conclusions that 'the investigation and the consequent decision of the Agency were motivated by extraneous factors, i.e. an accusing leaflet prepared and published by outsiders', and that the testimonies which led ultimately to the Agency's decision were 'tainted by such rancor and animosity among the

antagonists'. I do not accept these observations to the extent that they reflect on the Agency's action, and my decision is not an admission that these comments are applicable in any way to the Administration."

On 10 August 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The entire proceeding against the Applicant began in response to a bogus leaflet, which was clearly a personal attack against the Applicant and part of an ongoing campaign to defame him and deprive him of his position with UNRWA.

2. The whole investigation and decisions surrounding it were tainted by prejudice and improper motivation. The proceedings of the Board of Inquiry were full of animosity, and lacking in neutrality or objectivity.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's appointment in the interest of the Agency was a discretionary decision, which was justified by the Board of Inquiry's report.

2. There is no evidence to support the Applicant's allegation that the Respondent's decision was motivated by bias or prejudice.

The Tribunal, having deliberated from 7 to 28 July 1995, now pronounces the following judgement:

I. This long-standing employee of UNRWA appeals against the decision to terminate his services in the interest of the Agency under area staff rule 109.1 (i.e. regulation 9.1) with effect from 1 January 1992.

Prior to the difficulties which gave rise to this case, the Applicant seems to have had a good work-record, with a meritorious increment and a letter from the Director of UNRWA Operations, West Bank, commending his service.

The Applicant lays stress on what he describes as the malignant animosity of the persons who made the allegations against him.

II. The Applicant bases his case on the following: (i) that the allegations were made against him out of spite and because of factors which had nothing to do with the proper running of the camp or the way in which he carried out his work, and that there was a conspiracy against him; (ii) that the Board of Inquiry erred in factual matters and found against him despite a lack of evidence; (iii) that the Board of Inquiry's conclusion was tainted by an atmosphere of prejudice and improper motivation.

III. It is obvious that the Kalandia camp was in a condition of some turmoil during 1991. While the accusations against the Applicant culminated in August of that year in the first leaflet issued against him, it would appear that suggestions about the Applicant's probity had been made at an earlier stage. These earlier suggestions resulted in a memorandum from the Area Officer for Jerusalem, to the Director of UNRWA Operations, West Bank, saying that to prevent escalation in the matter, the Applicant might be transferred to the post of Assistant House/Master at RMTC (similar grade) thereby avoiding possible friction in the camp community.

IV. Subsequent to the statement against the Applicant, and, indeed, a counter-statement in another leaflet defending the Applicant, a Board of Inquiry was set up to investigate the allegations.

The Board found against the Applicant in four out of nine charges:

(i) That the UNRWA Sanitation Labourers had to work at the Applicant's house when they were on duty;

(ii) That the Applicant was in possession of a ration card registered in the name of a dead person in order to receive the rations;

(iii) That the Applicant counterfeited the number of trips made by the vacuum tanker in order to keep for himself the money paid;

(iv) That families who resided outside the camp were registered by the Applicant in the camp register, entitling them to rations.

V. Once the allegations were made, the Administration took the proper course in setting up the Board of Inquiry. While the Applicant may well be correct in his assertion that the allegations were made out of spite and that there was a conspiracy against him, these factors, of themselves, do not necessarily mean that the allegations are false. However, his assertion gives rise to the necessity to investigate the allegations in that context.

VI. There is nothing in the Board of Inquiry's thorough report to show that it did not investigate the matter fully and fairly and in the knowledge of the background against which the allegations were made. The fact that, of nine charges, they found against the Applicant in only four, is suggestive of the fair and unbiased way in which they approached their task.

The Joint Appeals Board (JAB) agreed with the Board of Inquiry's conclusion that the Applicant was guilty of improprieties. The JAB found that there was an extraneous factor in that the leaflet of accusation was compiled by outsiders. The Board also found that the testimony of witnesses to the Board of Inquiry was tainted by rancour and animosity and that the system was misused to settle a personal vendetta. Because of these factors, the JAB, by a

majority, recommended that the decision to terminate the Applicant's services for misconduct under staff rule 110.1 be reviewed to make it a termination in the interest of the Agency under staff rule 109.1. The dissenting member recommended re-instatement, stating that he had "no objection" to "serving [the Applicant] with a letter of censure" and imposing a limited period of suspension.

VII. The Tribunal agrees with the findings of the Board of Inquiry and of the JAB, and assesses this case on the basis that the Applicant was guilty of the limited number of charges of which the Board of Inquiry found him guilty.

VIII. In considering the penalty that has been imposed on the Applicant, the Tribunal takes cognizance both of the seriousness of the charges and the character and record of the Applicant. While the Tribunal does not seek to minimise the gravity of the offences, it notes that the Applicant had served UNRWA well, over a long period of time. He had been given two commendations to which reference has already been made. His record, with the exception of these present events, was good.

IX. Although the Tribunal is fully conscious of the discretionary power of the Commissioner General in disciplinary matters, the Tribunal considers that the mitigating factors have not been afforded sufficient consideration. In these circumstances, namely the long service and good record of the Applicant prior to the events in question, the Tribunal is of the view that termination was perhaps too severe a penalty.

The Tribunal therefore orders:

(i) That the Applicant be given priority consideration for appointment to a suitable post, and

(ii) That the Applicant be compensated in an amount equal to one year of his net base salary, at the rate in effect on the date of his separation from service.

X. The Tribunal makes no further order and rejects all of the other pleas of the Applicant.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 28 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary